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Choice Prop Sdn Bhd v Asie Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-455–12 OF 2014
HARMINDAR SINGH J
12 NOVEMBER 2015

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Contract — Specific performance — Conditional agreement — Parties entered into conditional agreement for purpose of financing and developing housing area — As condition precedent ('CP'), plaintiff need to procure financing to settle redemption sum — Whether plaintiff fulfilled CP — Whether non-fulfillment of CP rendered agreement void

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Pursuant to a concession agreement, the first defendant had been granted the full rights for the development of and approvals for a mixed development of property known as Taman Sari Lands. The first defendant had assigned the rights over the Taman Sari Lands to Bank Pembangunan Malaysia Bhd ('BPMB') as security for a banking facility of RM417m. For the purpose financing and developing the Taman Sari Lands, the first defendant entered into a subscription and shareholders agreement dated 22 August 2013 ('the SSA') with the plaintiff. The assignment of Taman Sari Lands to BPMB was acknowledged under the SSA which recorded the amount owing to BPMB as approximately RM327m excluding interest ('redemption sum'). The SSA was a conditional agreement whereby the plaintiff had undertaken to procure financing of approximately RM320m to be utilised to settle the redemption sum within the 'cut-off date' or as extended by the parties. The plaintiff claimed that it had fulfilled the condition precedent ('CPs') under the SSA by obtaining the Malayan Banking Bhd ('MBB') letters of offer. However the first defendant stated that the MBB's letter of offer was unacceptable. There was also an issue on involvement of Malaysian Resources Corp Bhd ('MRCB') in the funding of the redemption sum as the first defendant alleged that MRCB had agreed in principle the proposal in Parcel K which did not address the first defendant's concerns. The first defendant granted the plaintiff a final extension of the cut-off date until 23 May 2014. After the cut-off date, the first defendant told the plaintiff that they were proceeding to sign with a company known as Ecoworld. The first defendant then issued a notice of termination of the SSA on 26 November 2014. Dissatisfied with the termination, the plaintiff brought the present action for specific performance of the SSA. The plaintiff contended that it had fulfilled the CPs and the fact that it could not continue with the SSA was due to the act of the first defendant contracting with Ecoworld. In reply, the first defendant claimed that the plaintiff failed to fulfill the CPs within the cut-off date and further counterclaimed that the transaction was valid and

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lawful as well as consequential orders and damages. The first defendant also counterclaimed against the plaintiff for misrepresentation and breach of warranties by the plaintiff. The issue was whether the plaintiff had fulfilled the CPs.

Held, dismissing the plaintiff's claim and allowing the first defendant's counterclaim in part with costs of RM75,000:

(1) The plaintiff's contention that MBB's letters of offer amounts to having discharged its CPs obligations under the SSA was untenable. MBB's letters of offer envisaged performance of the SSA in a manner contrary to what had been contemplated by the parties in the SSA. The first defendant was within its right to object to it as their concerns were genuine and reasonable. With regards to MRCB, it was significant that MRCB itself had never agreed to the terms. The terms used 'agreed in principle', 'subject to further negotiations' and 'subject to contract' clearly implied that MRCB were not committing to the MBB's letters of offer (see paras 25–26).

(2) Pursuant to s 36 of the Contracts Act 1950 and cl 2.1 of the SSA, the non-fulfillment of the CP rendered the SSA void. It must follow that the plaintiff was not entitled to any rights under the SSA as the CPs were not met and significantly as well, not met by the last cut-off date of 23 May 2014. The plaintiff's case was therefore without merit (see para 27).

(3) The allegation of non-compliance and frustration because the first defendant was going to sign the agreement with Ecoworld was without basis. The first defendant had been forthcoming about all the issues it was facing and its desire to deal with Ecoworld as it was becoming apparent that the plaintiff was in no position to fulfill its part of the bargain in the SSA. Thus, the plaintiff's claim against the defendants could not succeed (see para 31).

(4) There was no evidence that the plaintiff knowingly made false statements to induce the first defendant to enter into the SSA. The only relief that the first defendant was entitled to was for a declaration that the SSA had been validly terminated as this was connected with the plaintiff's failure to prove its case (see para 32).

[Bahasa Malaysia summary

Berikutan perjanjian konsesi, defendan pertama telah diberikan hak sepenuhnya bagi pembangunan dan kelulusan bagi pembangunan bercampur bagi hartanah yang dikenali sebagai Taman Sari Lands. Defendan pertama telah menyerahkan hak ke atas Taman Sari Lands kepada Bank Pembangunan Malaysia Bhd ('BPMB') sebagai jaminan bagi kemudahan perbankan bagi sejumlah RM417 juta. Untuk tujuan pembiayaan dan pembangunan Taman Sari Lands, defendan pertama memasuki perjanjian langganan dan pemegang

saham bertarikh 22 Ogos 2013 ('PLPS tersebut') dengan plaintif. Penyerahan hak Taman Sari Lands kepada BPMB diterima di bawah PLPS tersebut yang merekodkan jumlah yang kena dibayar kepada BPMB sebagai lebih kurang sebanyak RM327 juta mengecualikan faedah ('jumlah penebusan'). PLPS tersebut adalah perjanjian bersyarat di mana plaintif telah berjanji untuk mendapatkan pembiayaan lebih kurang sebanyak RM320 juta untuk digunakan bagi menyelesaikan jumlah penebusan dalam masa 'cut-off date' atau seperti yang dilanjutkan oleh pihak-pihak. Plaintif mendakwa bahawa ia telah memenuhi syarat terdahulu ('ST') di bawah PLPS tersebut dengan mendapatkan surat tawaran Malayan Banking Bhd ('MBB'. Walau bagaimanapun, defendan pertama menyatakan surat tawaran MBB tidak boleh diterima. Juga terdapat isu atas penglibatan Malaysian Resources Corp Bhd ('MRCB') dalam membiayai jumlah penebusan kerana defendan pertama mendakwa bahawa MRCB pada dasarnya telah bersetuju cadangan dalam Parcel K yang tidak mempertimbangkan perkara-perkara yang membimbangkan bagi defendan pertama. Defendan pertama memberikan pelanjutan akhir tarikh tamat kepada plaintif sehingga 23 Mei 2014. Selepas tarikh tamat, defendan pertama memberitahu plaintif yang mereka sedang meneruskan untuk menandatangani perjanjian dengan syarikat yang dikenali sebagai Ecoworld. Defendan pertama kemudiannya mengeluarkaan notis penamatan PLPS tersebut pada 26 November 2014. Tidak berpuas hati dengan penamatan tersebut, plaintif membawa tindakan ini bagi pelaksanaan spesifik PLPS tersebut. Plaintif berhujah bahawa ia telah memenuhi ST tersebut dan fakta ia tidak dapat meneruskan dengan PLPS tersebut adalah akibat tindakan defendan pertama memasuki kontrak dengan Ecoworld. Dalam menjawab, defendan pertama mendakwa bahawa plaintif gagal untuk memenuhi ST tersebut dalam masa tarikh tamat dan selanjutnya menuntut balas bahawa transaksi tersebut adalah sah dan begitu juga dengan perintah berikutnya dan ganti rugi. Defendan pertama juga menuntut balas terhadap plaintif bagi misrepresentasi dan kemungkiran jaminan oleh plaintif. Isu adalah sama ada plaintif telah memenuhi ST tersebut.

Diputuskan, menolak tuntutan plaintif dan membenarkan sebahagian tuntutan balas defendan pertama dengan kos sebanyak costs RM75,000:

(1) Hujahan plaintif yang surat tawaran MBB merupakan perlepasan tanggungjawab ST nya di PLPS tersebut tidak dapat dipertahankan. Surat tawaran MBB tersebut membayangkan pelaksanaan PLPS tersebut dalam cara bertentangan kepada apa yang telah dimaksudkan oleh pihak-pihak di dalam PLPS tersebut. Defendan pertama adalah dalam haknya untuk membantah kepadanya kerana perkara-perkara yang membimbangkan adalah betul dan munasabah. Berkaitan MRCB, ia adalah penting bahawa MRCB sendiri tidak pernah bersetuju kepada terma-terma. Terma-terma yang digunakan 'agreed in principle', 'subject to further negotiations' dan 'subject to contract' jelas menyiratkan

bahawa MRCB tidak menyatakan kesanggupan kepada surat tawaran MBB (lihat perenggan 25–26).

(2) Berikutan kepada s 36 Akta Kontrak 1950 dan klausa 2.1 PLPS tersebut, jika tidak memenuhi ST tersebut akan membuatkan PLPS tersebut batal. Oleh itu plaintif tidak berhak kepada mana-mana hak di bawah PLPS tersebut kerana ST tersebut tidak dipenuhi dan jelas juga tidak dipenuhi pada tarikh tamat akhir pada 23 Mei 2014. Kes plaintif dengan itu tanpa merit (lihat perenggan 27).

(3) Dakwaan ketidakpatuhan dan kekecewaan adalah kerana defendan pertama akan menandatangani perjanjian dengan Ecoworld adalah tidak berasas. Defendan pertama telah memaklumkan tentang kesemua isu yang dihadapinya dan keinginannya untuk berurusan dengan Ecoworld kerana ia menjadi jelas bahawa plaintif bukan dalam kedudukan untuk memenuhi bahagian perjanjiannya di dalam PLPS tersebut. Oleh itu, tuntutan plaintif terhadap defendan-defendan tidak boleh dipenuhi (lihat perenggan 31).

(4) Tidak terdapat keterangan bahawa plaintif sengaja membuat kenyataan palsu untuk melibatkan defendan pertama untuk memasuki PLPS tersebut. Satu-satunya relief yang defendan pertama berhak adalah untuk perisytiharan bahawa PLPS tersebut telah ditamatkan secara sah kerana ini adalah berhubung dengan kegagalan plaintif untuk membuktikan kesnya (lihat perenggan 32).]

Notes

For a case on condition agreement, see 3(4) *Mallal's Digest* (5th Ed, 2015) para 6929.

Legislation referred to

Contracts Act 1950 s 36

Logan Sabapathy (Cherian Kuruvila and Alithea Wong with him) (Logan Sabapathy & Co) for the plaintiff.
K Mohan (S Kalashini with him) (Mohanadass Partnership) for the defendant.

Harmindar Singh J:

[1] The plaintiff and the first defendant entered into a subscription and shareholders agreement dated 22 August 2013 ('SSA' or 'the agreement') relating to the financing and development of property known as the Taman Sari Lands. It was common ground that it was a conditional agreement in that the SSA was subject to and conditional upon the fulfillment of various conditions precedent within the time defined as the 'cut-off date' in the SSA or as extended by the parties.

[2] However, by a letter dated 26 November 2014, the first defendant issued a notice of termination of the SSA on the ground that the conditions precedent ('CPs') had not been fulfilled. The plaintiff is now challenging the said termination and seeks by this action, inter alia, for an order for specific performance of the SSA. The plaintiff contends that the CPs had been fulfilled and it is entitled now to treat the SSA as unconditional. The plaintiff also contends that in spite of the meeting of the CPs, the first defendant went ahead by contracting with a third party, Ecoworld Development Bhd ('Ecoworld') thereby disabling itself from continuing with the SSA.

[3] The first defendant, however, claims that the plaintiff has failed to fulfill the CPs within the cut-off date as determined by the parties in the agreement. It seeks a declaration by way of the counter claim that the transaction was valid and lawful as well as consequential orders and damages.

THE RELEVANT FACTS

[4] The first defendant holds a concession pursuant to a concession agreement whereby the first defendant had been granted the full rights for the development of and approvals for a mixed development of the Taman Sari Lands on the terms and conditions set out therein. The Taman Sari Lands, consisting of 14 parcels of lands, are part of the privatised urban regeneration project of the Tunku Abdul Rahman Flats (or commonly known as the Pekeliling Flats).

[5] The second defendant is a dormant company. It was incorporated to be the joint venture vehicle to undertake the development of the Taman Sari Lands pursuant to the SSA. The third to 11th defendants together with the first defendant are the registered parcel owners of the Taman Sari Lands.

[6] Pursuant to the terms of the concession agreement, among others, the first defendant was required to and has completed two public housing projects known as the 'Sri Rampai Phase I Public Housing' and 'Sri Rampai Phase II Public Housing'. The projects involve the construction and completion of 2,791 units of low cost flats.

[7] In consideration of the first defendant carrying out the above, the government of Malaysia was to transfer or cause to be transferred six parcel of lands free from all charges, liens etc to the first defendant and its subsidiaries, namely, Parcels G, H, I, J, K, P and N to the first defendant, third defendant, fourth defendant, fifth defendant and the sixth defendant ('first project lands'). As at the date of the SSA, these titles had not been issued but have since been issued and transferred to the first defendant.

[8] There remain commitments under the concession agreement which have not been fulfilled by the first defendant, identified as the 'remaining commitments' in the SSA. Once performed, the titles to the remaining eight parcels of lands, namely, Parcels A, B, D, F L, M, Q and R will then be transferred by the government to the 11 defendants respectively.

[9] The first defendant had assigned the rights over and to the Taman Sari Lands to Bank Pembangunan Malaysia Bhd ('BPMB') as security for a banking facility of RM417m. This assignment is acknowledged in the SSA which records the amount owing to BPMB as approximately RM327m as at 31 December 2012, excluding interest ('redemption sum').

[10] In consideration of the first defendant inviting the plaintiff to participate in the development of the Taman Sari Lands under the SSA, the plaintiff had, among others, undertaken to procure financing of approximately RM320m ('initial second financial tranche') to be utilised to settle the redemption sum and redeem the first project lands from BPMB. This funding obligation is part of the conditions precedent to the SSA which must be fulfilled by the plaintiff. The plaintiff had paid RM50m to the first defendant, being the 'first financial tranche'.

[11] The full list of conditions precedent is identified in Schedule 2 of the SSA. In total, there are eight CPs to be achieved by the cut-off date. For the purposes of this dispute, the plaintiff is required to:

(a) cl 7: CPSB having furnished to Asie (i) the project milestones for the completion of the development of the Taman Sari Project and (ii) proof of availability of funding (via an offer letter or written confirmation) from a bank to settle the second financial tranche.

(b) cl 8: CPSB having procured and furnished to Asie a letter of offer issued by a bank for the funding of the initial second tranche.

[12] It was also part of the agreement that where the fulfillment of any CPs is subject to conditions, it is expressly a matter for the first defendant to decide ie whether to accept such conditions as provided in cl 2.4 of the SSA:

> 2.4 Conditions Precedent granted subject to conditions
>
> If the Conditions Precedent are granted subject to any condition, then such approval will not be deemed to have been obtained for the purpose of this Agreement unless such condition is acceptable to the party affected by such condition within 21 days from the date upon which the condition is made known to the party so affected.

[13] Another fundamental term of the parties' collaboration, as enshrined in cl 4.9 of the SSA, is that the shareholding of the parties in the joint venture company (the second defendant) is to be on a 55% – 45% basis, with the first defendant to have 45%. Clause 4.9 of the SSA reads,

> 4.9 Shareholding Proportions
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> Notwithstanding any other provisions of this Agreement, upon the fulfillment of all CPSB's financial covenants and/or obligations as set out in Clause 3.2 herein, the respective shareholdings of Asie and CPSB shall be maintained throughout the duration of this Agreement in the following Shareholding Proportions:

	Shareholder	Percentage of share capital of Company
1	Asie	45%
2	CPSB	55%

[14] In a nutshell, it was the case that the Taman Sari Lands cannot be developed until the first project lands are redeemed from BPMB. The redemption from BPMB is vital to the performance of the SSA. It is in the absolute interest of the first defendant to ensure that the lands are redeemed as soon as possible to avoid foreclosure and/or incurring further interest on the redemption sum.

[15] Arising out of the opposing positions or contentions by the parties, the pivotal issue for consideration by the court is whether the plaintiff had indeed fulfilled the CPs incumbent upon it pursuant to the contractual terms set out in the SSA.

WHETHER THE PLAINTIFF HAD FULFILLED THE CONDITIONS PRECEDENT

[16] Now the parties were acutely aware at all times that the SSA was negotiated and settled against the backdrop of possible foreclosure proceedings by BPMB over the Taman Sari Lands. As alluded to earlier, the first defendant had assigned over the rights of the Taman Sari Lands to BPMB as security for a banking facility mentioned earlier. There was therefore an element of urgency to avoid the lands from being foreclosed and/or incurring further interest on the redemption sum.

[17] So, were the CPs fulfilled as per the SSA? After a number of extensions of the cut-off date, by letter dated 28 March 2014, the plaintiff claimed that it had fulfilled its CPs with it obtaining the Malayan Banking Bhd ('MBB') letters of offers. The plaintiff then granted the first defendant an extension of two weeks from 30 March 2014 until 14 April 2014 to fulfill its CPs.

[18] However, by letter dated 31 March 2014, the first defendant told the plaintiff, through its solicitors, that MBB's letter of offer was unacceptable and a breach of the SSA and granted an extension until 14 April 2014 for the plaintiff to fulfill its outstanding obligations. One of the main reasons was the involvement of a new party, Malaysian Resources Corp Bhd ('MRCB'), in the funding of the redemption payment to BPMB.

[19] Nevertheless, the parties had discussions to clarify the terms of MRCB's participation. There were however serious concerns about MRCB's acquisition of 60% of the fifth defendant which would dilute the first defendant's shareholding. There was also a concern about how MRCB's development of Parcel K would affect the rest of the development. Even so, there was as yet no approval by the board of MRCB as to any of the proposals. There was in the end a final extension of the cut-off date to 23 May 2014. There was to be, as the evidence suggests, no extension after this.

[20] As could be gleaned from the electronic correspondence between the parties, an impasse became inevitable. By email dated 15 May 2014, the first defendant proposed three options, one of which was a proposal to jointly team up with Ecoworld. By email dated 17 July 2014, the first defendant sought confirmation of a tie-up proposal with Ecoworld. In the email of 21 July 2014, the first defendant told the plaintiff that they were proceeding to sign with Ecoworld. In the meantime, there were some negotiations on the terms of a deed of revocation and mutual rescission of the SSA between the first defendant and the plaintiff.

[21] A day after the agreement was signed between the first defendant and Ecoworld on 24 July 2014, the plaintiff forwarded a letter from MRCB in which it was stated that the board of MRCB had approved in principle the proposal for Parcel K. Clearly, this did not address the first defendant's concerns.

[22] Subsequently, various proposals were put forward. One dated 4 August 2014 was for the plaintiff to buy out the first defendant's entire stake via MRCB. In fact, by letter dated 10 September 2014, MRCB wrote directly to the first defendant to convey its intention to enter into negotiations to buy out the entire Taman Sari Lands.

[23] By letters dated 16 October 2014 and 31 October 2014, the plaintiff would further offer to purchase the first defendant's entire development rights under the concession agreement. The first defendant however issued a notice of termination of the SSA vide letter dated 26 November 2014.

[24] To revisit the pivotal question that was set out at the outset — was there a failure by the plaintiff to fulfill the conditions precedent under the SSA and was this fatal.

[25] I think the answer is plain. The plaintiff's contention that MBB's letters of offer amounts to having discharged its CPs obligations under the SSA is untenable. MBB's letters of offer envisages performance of the SSA in a manner contrary to what had been contemplated by the parties in the SSA. The first defendant was within its right to object to it as their concerns were genuine and reasonable.

[26] In any event, it is significant that MRCB itself had never agreed to the terms. Even the letter by the board of MRCB (25 July 2014) cannot by any stretch be considered to be acceptance of the terms. I think the terms used 'agreed in principle', 'subject to further negotiations' and 'subject to contract' clearly implied that MRCB were not committing to the MBB letters of offer. In other words, the MBB letters of offer was a non-starter due to MRCB's intransigence.

[27] In my view, and as a matter of law, the non-fulfillment of the CP rendered the SSA void. This is exactly the effect of s 36 of the Contracts Act. This position was embodied in cl 2.1 of the SSA. It must follow that the plaintiff is not entitled to any rights under the SSA as the CPs were not met and significantly as well, not met by the last cut-off date of 23 May 2014. The plaintiff's case is therefore without merit.

[28] I have noted the plaintiff's claim of a duty to co-operate and not to frustrate the performance of a contract. I do not think these kinds of assertions are helpful to the plaintiff in any way. When there is a written contract, parties must refer to the terms to identity with precision the obligations that arise and the breaches complained of.

[29] In any event, I am unable to see how commercial transactions can be sustained on the basis of vague and uncertain financing proposals. Any reasonable businessman would be right to feel doubtful of the performance of such a proposal.

[30] I think that the first defendant had been extremely accommodating to the plaintiff in exploring ways and means of accepting MBB's letters of offer. It was only after it became clear that the plaintiff would not be able to fulfill the CP's that the first defendant began to deal with Ecoworld. The first defendant was placed in a precarious position as the interest on the loan for BPMB was rising and there was the risk of foreclosure as well.

[31] In the circumstances, the allegation of non-compliance and frustration because the first defendant was going to sign the agreement with Ecoworld is without basis. In fact, the first defendant had been forthcoming about all the issues it was facing and its desire to deal with Ecoworld as it was becoming apparent that the plaintiff was in no position to fulfill its part of the bargain in the SSA. For these added reasons, the plaintiff's claim against the defendants cannot succeed.

[32] Coming now to the counterclaim by the defendants, I do not see how the claim for misrepresentation or breach of warranties can arise. There was no evidence that the plaintiff knowingly made false statements to induce the first defendant to enter into the SSA. The only relief that the first defendant is entitled to is for a declaration that the SSA had been validly terminated as this is connected with the plaintiff's failure to prove its care.

CONCLUSION AND ORDERS

[33] In the circumstances, and for the reasons stated, the plaintiff's claim is dismissed. The first defendant's counterclaim is allowed only in respect of prayer 34(a) of the defense and counterclaim and 34(f) for an order that the security documents be returned to the first defendant within seven days. Since the SSA has been declared to be validly terminated and is therefore void, all sums paid under the SSA has to be returned, in particular the sum of RM50m together with interest at 5%pa commencing 14 days after 26 November 2014 until realisation.

[34] On the question of costs, it is ordered that the plaintiff pay the defendants costs of RM75,000 to the defendants.

Plaintiff's claim dismissed and first defendant's counterclaim allowed in part with costs of RM75,000.

Reported by Dzulqarnain Ab Fatar